UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

DURHAM SCHOOL SERVICES, L.P.,	)	
	)	
Respondent,	)	
	)	
And	)	Case 15-CA-106217
	)	15-CA-112948
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN	)	15-CA-145094
AND HELPERS LOCAL UNION NO. 991	)	15-CA-145797
A/W INTERNATIONAL BROTHERHOOD OF	)	
TEAMSTERS,	)	
	)	
Charging Party	)	

RESPONDENT'S ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES Durham School Services, L.P., Respondent herein, and files this Answering Brief to General Counsel's Cross-Exceptions to the Decision of the Administrative Law Judge, as follows:

INTRODUCTION

On October 30, 2015, Judge Michael A. Rosas issued his decision finding that Respondent had violated section 8(a)(1) of the Act in certain respects. The judge recommended that certain other allegations, including the sole § 8(a)(3) allegation regarding Diane Bence, be dismissed. On December 4, 2015, Respondent filed exceptions to the judge's decision and a supporting brief. The General Counsel filed an answering brief on February 26, 2016. The General Counsel also filed cross-exceptions and a supporting brief. Respondent now files its Answering Brief.

DISCUSSION

The General Counsel's cross-exceptions focus exclusively on the ALJ's failure to find that Jim Bagby threatened employees regarding the collection of Union dues. The General Counsel alludes to the ALJ's finding that Bagby responded to questions from employees Hammes and Rast at the Pier Bar that "he 'didn't understand why people – we would want a union when it's going to take years' and years' before the Union would consummate a contract with the Company and employees would have to pay dues regardless of whether they supported or opposed the Union." (JD 7, 25-29). The General Counsel argues that the Board has in other cases found a violation even when the conversation is initiated by the employee. This is true, but the judge never stated that this fact created an absolute bar to finding a violation. Indeed, he found other violations by Bagby even though Bagby did not initiate the discussion of the Union.

Although the fact that the alleged coercive statement was made in response to employee questions is not a defense when the statement is on its face clearly coercive, the Board has never held that this fact is wholly irrelevant to assessing whether in fact a particular statement is sufficiently coercive to violate § 8(a)(1). "The Board will evaluate the totality of the circumstances to distinguish between employer statements that are unlawful threats and those that are privileged under Section 8(c)." *Correctional Medical Services, Inc.,* 356 NLRB No. 48 (2010). The cases cited by the General Counsel at pages 7-8 of his supporting brief all involved statements that on their face were clearly coercive and unlawful. In these circumstances, that they were made in response to employee questions was not deemed to be a defense.

What the judge actually held was that "the factual context provided does not support a finding" that Bagby threatened the employees regarding the payment of dues. (JD 16- 6-12). This conclusion is well supported by the record and is consistent with the Board's "totality of the

circumstances" test. This "factual context" included not only the fact that Bagby was responding to questions raised by employees, but the fact that the setting was social in nature, and the fact that Respondent lacked any ability to carry out the alleged threat. Neither Bagby nor Respondent had any ability to control the Union's dues policy. Instead, this was a matter within the exclusive control of the Union. Even if Bagby misstated the Union's policy and misstated the law, such misstatements or misrepresentations would not arise to the level of unlawful threats. Where, as here, a party lacks the ability to carry out the threat, the Board will find a violation only if the employee could reasonably believe that the party did possess the ability to carry out the threat. *Labriola Baking Co.*, 2015 WL 1777544, n. 2 (N.L.R.B.) (2015) (union lacked ability to carry out threat of job loss); *North Hills Office Services, Inc.*, 346 NLRB 1099, 1102 (2006) (employer's statements that union had reported that employer employed undocumented workers not a threat because statements referenced employer's "view of what the Union had done and what the Union allegedly planned on doing" and employees "would reasonably understand" that the actions were not "within the control of the Respondent"). Bagby's remarks clearly referenced his view of what the Union would do. Whether correct or not, Rast and Hammes could not reasonably believe that Respondent had any control over the subject. Thus, the judge correctly found that Bagby did not make an unlawful threat regarding Union dues.

CONCLUSION

Respondent requests that the Third Consolidated Complaint be dismissed in its entirety.

Respectfully submitted, this 9th day of February 2016.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that this day I served the foregoing ANSWERING BRIEF on the following persons by electronic mail:

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Dated this 9th day of February 2016.

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